IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.5414 OF 1991

Sou. Kamalabai Bajirao
Gaikwad, since deceased
through her heir and legal
representative:
Sanjay Madhukar Gaikwad,
Aged 27 years, Occ: Business,
r/o 1325/26E, Shivaji
Uddamnagar, Kolhapur. .... Petitioner

- Versus -

Khatik Samaj,
Registered Society through
Secretary Shri Vilas Ganapati
Janawekar, age about Adult,
Occupation Service,
residing at 'C' Ward,
1408, Kolhapur. .... Respondent

Shri A.A. Kumbhakoni for the Petitioner.

Shri P.D. Dalvi for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 25, 2004

ORAL JUDGMENT:

1. Heard the learned Advocates for the parties. Perused the records.

2. The petitioner challenges the judgment and order passed by the lower Appellate Court on 28-10-1991 in Regular Civil Appeal No.154 of 1986. The lower Appellate Court, by the impugned judgment, has allowed

the appeal filed by the respondent against the judgment and decree passed by the trial Court in Regular Civil Suit No.1103 of 1980. The trial Court had dismissed the suit, however, the lower Appellate Court has decreed the same ordering eviction of the petitioner from the suit premises for non-payment of arrears of rent for a period of three years.

3. Few facts relevant for the decision are that the shop premises situated on the ground floor of the building at Kolhapur belong to the respondent/plaintiff and are in occupation of the petitioner/defendant since 20-1-1971. In fact, in place of the suit premises there existed an old building which was in occupation of the petitioner as the lessee thereof. On 9-10-1969 the petitioner vacated the suit premises in order to enable the respondent to construct a new building in its place. At that time an agreement was entered into between the parties wherein the respondent had agreed with the petitioner to handover the suit premises to the petitioner on completion of construction of the new building. In relation to the old premises, which admeasured 520 sq.ft., the petitioner used to pay rent of Rs.35/- per month. As regards the rent in relation to the suit premises in the new building, in terms of the agreement entered into between the parties at the time of delivery of vacant possession of the old

premises, the same was required to be fixed by the respondent/landlord in accordance with the provisions of law. The suit premises in the new building admeasures 350 sq.ft. Though the suit premises came to be occupied by the petitioner since 20-1-1971, no rent was paid by the petitioner to the respondent. The respondent thereupon served a notice dated 2-5-1974 claiming rent from the petitioner for the period from 20-4-1971 till 30-6-1974 at the rate of Rs.350/- per month. In reply to the said notice, the petitioner offered an amount of Rs.35/- per month by money order for the said period which was refused by the respondent. On 15-7-1974 the petitioner filed an application being Application No.132 of 1974 for fixation of the standard rent, wherein the Court fixed the interim rent at the rate of Rs.100/- per month and directed the petitioner to deposit the entire arrears till 10-8-1974 and further to pay the rent every month by the tenth thereof. The petitioner deposited a sum of Rs.15,500/- in the said proceedings. The said application came to be dismissed for default on 16-7-1980. The respondent thereafter, claiming that an amount of Rs.22,400/- was still due towards the arrears of rent from the petitioner, filed suit for eviction on the ground of default in payment of rent. The proceedings were sought to be contested on various grounds by the petitioner. The trial Court while holding that the petitioner had not paid the rent for

more than six months and which could be a ground for eviction, dismissed the suit on the ground that subsequent to construction of the new building, it was the obligation of the respondent/landlord to get the standard rent fixed and as no standard rent was fixed, there was no cause of action for eviction of the petitioner on the ground of default in payment of rent. Simultaneously, the trial Court also fixed the rent to Rs.100/- per month even though there was no application for fixation of such standard rent. The suit was dismissed on 21-12-1985. The matter was carried in appeal by the respondent and the lower Appellate Court holding that the petitioner had failed to deposit the rent in accordance with the order fixing the interim rent passed in Case No.132 of 1974 and as the respondent had served a valid notice dated 2-5-1974 terminating the tenancy, and yet there was failure to comply with the obligation by the petitioner in relation to payment of rent in accordance with the provisions of law, set aside the decree of dismissal of the suit and decreed the suit ordering eviction of the petitioner on the ground of default in payment of rent. Hence the present petition.

4. While challenging the impugned judgment, the learned Advocate for the petitioner submitted that undisputedly consequent to receipt of the notice dated 2-5-1974 the petitioner had offered the rent in accordance with the

earlier agreement and the same was refused to be accepted by the respondent. He further submitted that even though there was a clear obligation upon the landlord to get the standard rent fixed consequent to induction of the petitioner in the new premises in the year 1974, the respondent had failed to comply with the said obligation and therefore there was no liability to pay the rent more than the amount of Rs.35/- per month as was fixed between the parties in relation to the old premises and therefore even though the petitioner had offered rent at the rate of Rs.35/- per month pursuant to the notice served upon him, the notice issued under Section 12(2) itself was bad in law as no occasion had arisen for issuance of such a notice to the petitioner in the absence of fixation of the quantum of standard rent in relation to the new premises and under no circumstances the respondent could have claimed rent at the rate of Rs.350/- per month without any basis to claim the said amount. In any case, therefore, the notice issued to the petitioner was invalid and illegal and therefore the proceedings initiated against the petitioner were bad in law. He has further submitted that the fact that there was no standard rent fixed in relation to the suit premises is apparent from the order passed by the lower Appellate Court. A clear finding in that regard discloses that the said issue was left undecided and therefore this Court by its order dated

16-12-1991, had directed the trial Court to record a finding as regards the standard rent, after allowing the parties to lead evidence in respect thereof, while holding that there was no agreement between the parties for payment of rent at the rate of Rs.350/- per month in relation to the suit premises. This lends clear support to the petitioner's contention that in the absence of fixation of standard rent, no proceedings for eviction could have been initiated on the ground of default in payment of rent.

5. On the other hand, the learned Advocate appearing for the respondent, placing reliance in the decision of the Apex Court in the matter of **Bathutmal Raichand Oswal v. Laxmibai R. Tarta and another,** reported in (1975) 1 SCC 858, submitted that the lower Appellate Court on analysis of the evidence on record had arrived at the finding about failure on the part of the petitioner to pay the arrears of rent in accordance with the provisions of law and the said finding being a finding of fact, there can be no case for interference therein in writ jurisdiction under Article 227 of the Constitution of India as the re-appreciation of the evidence is not expected in such proceedings. The finding as regards the default in payment of rent having attained finality consequent to the judgment of the lower Appellate Court, there is no case for interference

in writ jurisdiction in the impugned order and the petition on that count itself is liable to be dismissed. The learned Advocate for the respondent has further submitted that the finding arrived at by the lower Appellate Court also discloses that the petitioner had been irregular in depositing the rent even during the pendency of the proceedings for eviction and the provisions of law comprised under Section 12(3)(b) clearly requires the payment to be made regularly and failure in that regard could warrant eviction of the tenant and that is what has been done in the case in hand and in that regard reliance is placed in the decision of the Apex Court in the matter of **Mranalini B. Shah and another v. Bapalal Mohanlal Shah,** reported in AIR 1980 SC 954. Further, drawing attention to the decision of the Division Bench in **Jaypal Bandu Adake and another v. Basavali Gurulingappa Mhalank and another,** reported in 1982 Mh.L.J. 512, he has submitted that the only way to avoid the eviction proceedings by the tenant is to comply with the notice under Section 12(2) within one month and in case of failure thereof, the tenant has to justify the non-payment of rent to the satisfaction of the Court and having not done so by the petitioner in the case in hand, there is no case for interference in the impugned order. It was also sought to be argued that in the proceedings initiated by the petitioner for fixation of the standard rent, the Court had already

fixed the interim rent at the rate of Rs.100/-, however, the petitioner allowed the said proceedings to be dismissed for default, and thereby impliedly consented to the claim of the respondent to the rent of Rs.350/- per month for the suit premises to be the standard rent. According to the learned Advocate for the respondent, failure on the part of the petitioner to pursue the said proceedings after the dismissal thereof for default, discloses the implied admission on the part of the petitioner as regards the genuineness of the claim of the respondent in relation to the amount of Rs.350/- per month being the rent pertaining to the suit premises and the petitioner is now estopped from denying the same and in that regard reliance is placed in the decision in the matter of **Lila Kishenchand Jaisinghani v. Odhavji Popatlal Ahya,** reported in 1978 76 Bom.L.R. page 523. Attention is also drawn to the decision of the Apex Court in the matter of **Kamleshwar Prasad v. Pradumanju Agarwal (dead) by LR's.,** reported in AIR 1997 SC 2399 in support of the contention that in writ jurisdiction, the re-appreciation of the evidence is not permissible.

6. Undoubtedly, the proceedings in the case in hand are between the landlord and the tenant whose relations are governed by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter called as "the said Act". It is also not in dispute that the proceedings

were sought to be initiated for eviction of the petitioner from the suit premises on the ground of non-payment of rent. Such a ground is available under Section 12 of the said Act. The sub-section (1) of Section 12 provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the said Act. Evidently a tenant who is ready and willing to pay the amount of standard rent and the permitted increases if continues to pay such rent regularly, there could be no occasion for the landlord to seek eviction of the tenant on the ground of default in payment of rent.

7. The sub-section (2) of Section 12 of the said Act provides that no suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act, 1882. This provision creates an embargo for a period of one month from the date of

service of notice upon the tenant on the right of the landlord to initiate eviction proceedings against a tenant on the ground of failure to pay the rent by the tenant. It, however, specifically provide that such a notice has necessarily to be in relation to the standard rent or the permitted increases due and has to be served in the manner provided under Section 106 of the Transfer of Property Act, 1882.

8. The sub-section (3) of Section 12 comprises of two sub-clauses - the first in relation to the cases where the rent is payable by month and the second in relation to the other cases. The Clause (a) provides that where the rent is payable by the month and there is no dispute regarding the amount of standard rent or the permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession. The Clause (b) provides that in any other case no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and the permitted increases then due and thereafter continues to pay or

tender in Court regularly such rent and the permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court. This sub-section has been amended in the year 1987. However, we are not concerned with the amended provision as the suit relates to the year when the above provision was very much in force and there is no dispute on this point.

9. In accordance with the sub-section (3) of Section 12, therefore, in cases where the standard rent is not payable by the month, an option is available to the tenant to get a favourable decree by depositing the entire arrears of the standard rent on the first date of hearing or on such date as the Court may fix and thereafter to be regular in payment of the standard rent; whereas in case where the standard rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, and the tenant had failed to pay the arrears of such standard rent and permitted increases within one month after service of notice under sub-section (2) of Section 12, the decree for eviction has to follow as a matter of course.

10. The explanation I to Section 12 provides that where there is a dispute as to the amount of the standard rent

or the permitted increases recoverable under the said Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month on receipt of the notice referred to in sub-section (2) thereof, he makes an application to the Court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order to be made by the Court in such proceedings. The explanation II provides that for the purpose of sub-section (2) of Section 12, reference to "standard rent" and "permitted increase" shall include reference to "interim standard rent" and "interim permitted increase" specified under sub-section (3) or (4) of Section 11.

11. The Section 11 speaks about the fixation of the standard rent. In accordance with sub-section (1) of Section 11, the Court is empowered to fix the standard rent upon an application in that regard being made in the cases which are enumerated under the Clauses (a) to (e) thereunder. The Clause (e) refers to a situation where there is a dispute between the landlord and the tenant regarding the amount of standard rent. The sub-section (2) of Section 11 also provides that if there is any dispute between the landlord and the tenant regarding the amount of permitted increases, the Court may determine such amount. The sub-section (3) provides

that if any application for fixing the standard rent or for determining the permitted increases is made by a tenant who has received a notice from his landlord under sub-section (2) of Section 12, the Court shall forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant, and make an order directing the tenant to deposit such amount in Court or at the option of the tenant make an order to pay the same to the landlord, pending the final decision of the application. It also provides for the consequences in case of failure to deposit such amount inspite of the order of the Court and accordingly empowers the Court to dismiss the main application itself. In terms of sub-section (4) of Section 11, where at any stage of a suit for recovery of rent, whether with or without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order, the Court may make an order directing the tenant to deposit in Court forthwith such amount of the rent as the Court considers to be reasonably due to the landlord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the Court may specify. The sub-section (5) debars remedy of appeal

against any order passed under sub-sections (3) and (4) whereas the sub-section (6) provides that application under the said sub-section can be filed jointly by all or any of the tenants interested in the premises situated in the same building. In accordance with Section 11A, no new application for standard rent can be entertained if it is already fixed by the competent Court at the instance of any one of the parties to the proceedings unless there are changes in the circumstances specified thereunder.

12. The Section 5 of the said Act deals with the definition of various expressions used in the said Act. The Section 5(10) defines the expression "standard rent". As per Clause (a) thereof this is fixed by the Court under the said Act. In terms of Clause (b) thereof when the standard rent is not so fixed, subject to the provision of Section 11, it is the rent at which the premises were let out on the first day of September, 1940, or where they were not let out on the first day of September, 1940, the rent at which they were first let out before that day, or where they were first let after the first day of September, 1940, the rent shall be at the rate at which they were first let out, and in cases specified under Section 11, the rent shall be as fixed by the Court. Obviously in terms of the definition clause pertaining to the standard rent, it is the rent

either fixed by the competent authority under the relevant statutory provision or by way of lawful agreement in that regard between the parties. The Section 7 of the said Act deals with the subject in relation to rent in excess of the standard rent. The sub-section (1) thereof provides that no person shall claim or receive on account of rent for any premises any increase above the standard rent, unless the landlord is lawfully entitled to receive such excess amount.

13. The above provisions of law, therefore, disclose that in order to enable the landlord to seek eviction of a tenant from the leased premises on the ground of default in payment of rent, it is absolutely necessary for the landlord to serve a notice informing the tenant about the arrears. However, such a notice has necessarily to comply with the mandatory provision of law comprised under the sub-section (2) of Section 12 of the said Act. Such a notice, therefore, should be served upon the tenant at least one month prior to institution of the suit for eviction. The said notice should essentially relate to the arrears relating to the standard rent and/or the permitted increases. It is pertinent to note that Section 12 repeatedly refers to the expression "standard rent" and "permitted increases" and further these expressions are specifically defined under the said Act. Obviously therefore the expressions

"standard rent" and "permitted increases" used in Section 12 cannot have a meaning different from the one disclosed under Section 5(10) of the said Act. The "standard rent" therefore has necessarily to be either the agreed rent in terms of the Clause (b) of Section 5(10) or the rent which is fixed as the standard rent by the Court under Section 11 of the said Act. It is also to be noted that the proceedings under Section 11 for fixing of the standard rent need not necessarily be at the instance of the tenant alone. There is no bar for the landlord to initiate such proceedings. Undoubtedly, sub-section (3) of Section 11 speaks about an application at the instance of the tenant upon receipt of notice under Section 12(2) of the said Act, but the sub-section (1) does not make any differentiation between an application at the instance of the tenant or at the instance of the landlord. It is to be noted that while Section 12 specifically speaks of right in favour of the landlord to seek eviction of the tenant on the ground of default in payment of standard rent or permitted increases, there is no other provision empowering the landlord to evict the tenant on the ground of default in payment of rent. Obviously, the ground for eviction on the basis of default in the payment of rent is restricted to the default in payment of standard rent and/or permitted increases and not otherwise.

14. The provision in sub-section (3) of Section 11 specifically refers to the notice under Section 12(2). Obviously, the sub-section (3) of Section 11 does not contemplate mere existence of dispute between the landlord and the tenant as regards the standard rent but it speaks of an application by the tenant for fixation of the standard rent consequent to the receipt of notice under Section 12(2). In terms of sub-section (3) of Section 11 of the said Act, there can be no occasion for an application thereunder unless a notice under Section 12(2) is received by the tenant. Undoubtedly, even in the absence of such notice and in case of dispute about the standard rent payable by the tenant, either of the parties i.e. the landlord or the tenant, can file an application for fixation of such standard rent in terms of Section 11(1). In fact, sub-section (1) of Section 11 is a general provision, particularly the Clause (e) thereof, which enables the concerned party to approach the Court for fixation of standard rent in case of any dispute in that regard. But, the provisions of sub-section (3) of Section 11 could be attracted only after receipt of notice under Section 12(2) and not otherwise.

15. The above discussion would show that any notice issued without the demand for amount of the standard

rent or the permitted increases, would not be in accordance with the provision of law comprised under Section 12(2) of the said Act. Considering the same, and applying the said provisions to the facts of the case, it is to be seen that the findings arrived at by the trial Court was that no standard rent was fixed and therefore the petitioner was directed to deposit the rent as per the interim arrangement at the rate of Rs.100/- per month. As against this, the lower Appellate Court had held that the agreed rent of the suit premises appeared to be Rs.350/- per month. However, as rightly submitted by the learned Advocate for the petitioner, the said finding is totally contrary to the materials on record and indeed this Court while issuing the rule in the petition had by the order dated 16th December, 1991 held that "The trial Court has not accepted the case of the respondent to the effect that the agreed rent of the suit premises was Rs.350/- per month". In addition thereto, the trial Court had also arrived at the finding that "there was no agreement about payment of rent about the specified rate at the newly constructed premises which are occupied by the tenant". Undisputedly the lower Appellate Court has not interfered in the said finding nor has arrived at any contrary finding. Apparently therefore, neither there was any agreed amount of rent in relation to the suit premises nor the standard rent in respect of the

premises was fixed by the Court below.

16. The learned Advocate appearing for the respondent, however, has submitted that the petitioner herself had approached the Court under Section 11 for fixation of the standard rent and had obtained interim order at the rate of Rs.100/- per month as being the interim standard rent. Therefore, in any case, before initiation of the proceedings for eviction of the petitioner, the said amount was fixed as the interim standard rent and the petitioner allowed to get the said proceedings dismissed and did not pursue the same any further which clearly debars the petitioner from disputing that the premises are without any standard rent being fixed for the same. In that regard, reliance is placed in the matter of **Lila Kishenchand Jaisinghani** (supra). Undisputedly, in terms of the agreement between the parties consequent to induction of the petitioner in the new premises, it was necessary for the respondent/landlord to get the standard rent fixed in relation to the suit premises and there was no attempt made by the respondent in that regard. This fact coupled with the finding about absence of agreement between the parties regarding the quantum of rent for the suit premises clearly disclose that in relation to the suit premises on the day when the notice dated 2-5-1974 was issued, there was no standard rent within the meaning of the said expression

under Section 12(2) of the said Act. Obviously therefore, there was no lawful and valid notice issued to the petitioner for initiation of the eviction proceedings on the ground of default in payment of rent. As already seen above, the issuance of a valid notice is a condition precedent to enable the landlord to initiate the eviction proceedings on the ground of default in payment of rent. In fact, the service of such a notice upon the lessee relates to the jurisdictional fact which would empower the Court to take cognisance of the eviction proceedings against the lessee on the ground of default in payment of rent. Once it is disclosed that this jurisdictional fact was absent on the day when the Court took cognisance of the proceedings for eviction of the lessee on the ground of default in payment of rent, no amount of failure on the part of the petitioner to take steps under Section 11 for fixation of the standard rent would enure to the benefit of the landlord to get the invalid notice validated retrospectively. It is also to be noted that in case of failure on the part of a party to pursue the matter which has been dismissed for default, there can hardly be a case of estoppel or applicability of the principle of res judicata, either constructive or otherwise. The law in that regard is well-settled.

17. The view that I am taking, therefore, in the matter

does not require me to address to various other points sought to be raised on behalf of either parties to the proceedings. The order of eviction passed in the proceedings initiated without compliance of the mandatory provision of law comprised under Section 12(2) of the Rent Act, cannot be sustained. The petition is bound to succeed for the reasons stated above and, therefore, the impugned order is liable to be set aside and the order passed by the trial Court dismissing the suit is to be confirmed.

18. The petition, therefore, succeeds. The impugned order is hereby quashed and set aside. The proceedings initiated for eviction of the petitioner are hereby quashed and dismissed. The rule is made absolute with no order as to costs.